FILE COPY

Supreme Court, U.S.
FILED
MAR 1 5 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965

No. 439

UNITED STATES OF AMERICA,

Petitioner,

against

ANTHONY GRACE & SONS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR ANTHONY GRACE & SONS, INC., RESPONDENT

DAVID FROMSON,
600 Old Country Road,
Garden City, New York,
Counsel for Respondent.

DAVID FROMSON,
RICHARD L. BRENNER,
on the Brief.

INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutory and Contract Provisions Involved	2
1. Statute	2
2. The Disputes Provision	3
3. Miscellaneous Contractual Provisions	3
Statement of the Case	4
1. Nature of the Controversy	4
2. Proceeding before Armed Services Board of Contract Appeals	5
3. Court of Claims Action	5
4. Proceedings in the Supreme Court	6
Summary of Argument	6
ARGUMENT:	
I—Since the present suit is outside the scope of both the "disputes" clause in the contract and the Wunderlich Act, the holding in Bianchi is inapplicable	7
II—Where the contracting officer fails to perform an act required under the contract and where the administrative agency refuses to accept jurisdiction, the aggrieved party is deemed to have exhausted its administrative remedy and is thereby justified in filing suit in the Court of Claims	14
III—The administrative record before the Court of Claims involves a question of law, thereby permitting said court to retain general jurisdiction and to resolve de novo all the related factual issues	18
CONCLUSION	21

Citations

PAGE

CASES:

Automatic Screw Prods. Co. v. United States, 169 F. Supp. 95 (Ct. Cl. 1959) 15

Beacon Construction Co. v. United States, 314 F. 2d 501 19

Bell Aircraft Corp. v. United States, 100 F. Supp. 661 (1951), aff'd 344 U. S. 860 (1952) 20

Brister & Koester Lumber Corp. v. United States, 188 F. 2d 986 (D. C. Cir. 1951) 17n

Cape Ann Granite Co., Inc. v. United States, 100 Ct. Cl. 53, cert. denied, 321 U. S. 790 16

Centex Constr. Co. v. United States, No. 342-60, Ct. Cl. June 7, 1963 12

C. J. Langenfelder & Sons, Inc. v. United States, 334 F. 2d 600 16

Heid Bros., Inc. v. United States, 69 Ct. Cl., 704 (1930) 16

Hele v. United States, 100 Ct. Cl. 289 (1943) and 103 Ct. Cl. 472 (1945) 16

H. B Zachry Co. v. United States, No. 332-61, Ct. Cl April 16, 1965 16

Len & Co. and Associates, 1962 BCA 17854 (ASBCA 1962) 12

Maxan Dress Corp. v. United States, 115 F. Supp. 439 (1953) 15

Anthony B. Miller v. United States, No. 3-62, Ct. Cl., April 5, 1963 ..... 4n

P.L.S. Coat & Suit Corp. v. United States, 148 Ct. Cl. 296 (1960) 19

Southeastern Oil Florida, Inc. v. United States, 115 F. Supp. 198 (1953) 16

PAGE

CASES (cont'd):

Stein Bros. Mfg. Co. v. United States, 337 F. 2d 861 ..... 19, 20

United States v. Carlo Bianchi & Co., 83 S. Ct. 1409 (1963), 373 U. S. 711 ..7, 8, 9, 10, 13, 14, 19, 20, 21

United States v. Blair, 321 U. S. 730, 735 16

United States v. Blake, 161 F. Supp. 76 (E. D. N. C. 1958) 17n

United States v. Holpuch Co., 328 U. S. 234, 240 .. 16

United States v. Wunderlich, 342 U. S. 98, 100, 72 S. Ct. 154, 155, 96 L. Ed. 113 7

U. S. Casualty Co. v. United States, 67 F. Supp. 950 (1946) 15

Wessel, Duval & Co. v. United States, 126 F. Supp. 79 (S. D. N. Y. 1954) 17n

Wingate Construction Co. v. United States, No. 394-60 Ct. Cl., January 24, 1964 19

WPC Enterprises, Incorporated v. United States, 323 F. 2d 874 19

STATUTES:

Capehart Act, 42 U. S. C. Secs. 1594-1594j; 12 U. S. C. Secs. 1748-1748i 4n

Wunderlich Act, 68 Stat. 81, 41 U. S. C. 321-322 .....2, 8, 19, 20, 21

28 U. S. C. Sect. 1491 (Sup. 1951) 7

MISCELLANEOUS:

Birnbaum, Owen—"Questions of Law and Fact and the Jurisdiction of the Armed Services Board of Contract Appeals"; Federal Bar Journal, Vol. 19, No. 2, April 1959, p. 120 at p. 132 ..... 20n

PAGE

MISCELLANEOUS (cont'd):

Crowell and Anthony, "Practical Problems Facing Contractors' Counsel as a Result of Fragmentation of Remedies", Vol. 18 Administrative Law Review 1965, pages 128-144 ..... 13n

Davis, Administrative Law, 874 (1957) 20n

Davis, Administrative Law, Fol. 199, Sec. 189 (1951) 17n

Disputes Clause, Paragraph 2 of Letter of Acceptability 3

Evans, W. Ney—"The United States Court of Claims", Federal Bar Journal, Vol. XVII 1957, No. 2 ..... 15n

Leventhal, "Public Contracts and Administrative Law", ABA Journal, Vol. 52, January 1966, p. 35 .....11, 11n

Schultz, Wunderlich Revisited: New Limits on Judicial Review of Administrative Determination of Government Contract Disputes, 29 Law & Contemp. Prob. 115, 127 (1964) 17n

Spector, Is It "Bianchi's Ghost"—Or "Much Ado About Nothing"?, 16 Ad. L. Rev. 265, 289 (1964) 17n

IN THE

Supreme Court of the United States

October Term, 1965

No. 439

UNITED STATES OF AMERICA,

Petitioner,

against

ANTHONY GRACE & SONS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR ANTHONY GRACE & SONS, INC., RESPONDENT

Opinions Below

The opinion of the Armed Services Board of Contract Appeals (R. 25) is unreported. The opinion of the Commissioner of the Court of Claims (R. 48-65) is unreported. The opinion of the Court of Claims (R. 66-91) is reported at 345 F. 2d 808.

Jurisdiction

The opinion and order of the Court of Claims were entered on May 14, 1965. The Petition for a Writ of Certiorari was filed on August 9, 1965 and granted on November 8, 1965 (R. 92). The jurisdiction of this Court rests upon 28 U. S. C. 1255(1).

Questions Presented

1. Is the present suit outside of the scope of both the "Disputes" clause in the contract and the Wunderlich Act?

2. Has a party exhausted its administrative remedy and thereby justified in filing suit in the Court of Claims where the administrative board refuses to accept jurisdiction?

3. Where the Court of Claims has before it an administrative record involving a question of law only, may it nevertheless retain general jurisdiction and resolve de novo related factual issues?

Statutory and Contract Provisions Involved

1. Statute

The Act of May 11, 1954, 68 Stat. 81 (the Wunderlich Act, 41 U. S. C. 321-322), provides:

> "That no provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such official or his said representative or board is alleged: *Provided, however,* That any such decision shall be final and conclusive unless the same is fraudulent [*sic*] or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence.
>
> Sec. 2. No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board."

2. The Disputes Provision

Paragraph 2 of the letter of acceptability (R. 16) provided in relevant part:

> 2. Failure to perform all obligations prior to the time prescribed for closing will be just cause for cancelling all commitments undertaken with you in connection with the housing project and for the recovery under your bid security of liquidated damages in the sum of $25,000, together with actual damages to the Department, such actual damages to be itemized and determined by the Contracting Officer, whose decision will be reduced to writing and furnished to you by mail or otherwise. Such decision shall be final and conclusive unless, within 30 days from the receipt thereof, you appeal in writing to the head of the Department or his duly authorized representative, and his decision shall, unless determined by a court of competent jurisdiction to have been fraudulent or capricious or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence, be final and conclusive. In connection with any appeal under this paragraph you will be afforded an opportunity to be heard and to offer evidence in support of your appeal.

3. Miscellaneous Contractual Provisions

The Invitation For Bid, after setting forth the purposes of the Capehart Act, included so far as here pertinent, a provision for examination of the forms involved (R. 49); applicable minimum wage schedules (R. 49-50); a requirement that the bidder submit a bid deposit of $25,000 (R. 50); instructions concerning mortgages (R. 50); further rules concerning wage scales (R. 51); the terms of the letter of acceptability (R. 51); an acknowledgment by the bidder that it was aware of the provisions of the National Housing Act and Davis-Bacon Act (R. 52); and instructions concerning the commencement of work (R. 52-53). Also attached to the Invitation were instructions concerning wage determinations, minimum rates of wages and specifications covering

section 1 "On-Site, Site Preparation" and Section 2 "On-Site, Excavation Filling and Back Filling for Building Construction" (R. 53-54).

Statement of the Case

1. Nature of the Controversy

This case arose out of a contract between the United States acting through the Department of Air Force (Government) and Anthony Grace & Sons, Inc. ("Grace"), in which case Grace seeks to recover its bid deposit of $25,000 and damages amounting to $450,000.

Over eight years ago, in August 1958, the Government issued an Invitation For Bid for the construction of 177 units of Capehart[1] family housing to be constructed at Topsham Air Force Station in Maine.

Said Invitation For Bid included schedule of wage rates determined by the Secretary of Labor as applicable to the work to be performed. The aforementioned schedule in substance set forth the minimum rates per hour for specific laborers and mechanics, including specifically designated building laborers; apprentices; hourly rates for building construction personnel and heavy and highway personnel. A further document accompanied said bid, issued by the Federal Housing Administration entitled, "Final Appraisal and Eligibility Statement" together with plans and specifications prepared by the architects, segregating and defining the scope of situs of the work.

On September 30, 1958, the opening date, Grace submitted its bid at a base price of $2,653,022 and certain ad-

[1] The Capehart Act is cited as 42 U. S. C. Secs. 1594-1594j; 12 U. S. C. Secs. 1748-1748i. For a brief explanation of the procedures under the Capehart Act, see *Anthony P. Miller, Inc.* v. *United States*, No. 3-62, Ct. Cl., April 5, 1963.

ditive alternatives at a price of $213,071, making a total bid of $2,866,093.

On October 29, 1958, the Department of Air Force, by letter designated "Letter of Acceptability", advised Grace that it was the successful bidder and that it was awarded the contract.

Between November 19, 1958 and July 2, 1959, negotiations and conferences ensued concerning the correct wage schedules to be used, with conflicting determinations of various agencies within the Government compounding the problem as to the correct rate, as well as definition of scope of work.

On October 1, 1959, the Government cancelled its commitment with Grace, whereupon a series of letters were exchanged between the attorney for Grace and the Government (R. 86-87), referable to the "decision" of the Air Force to cancel Grace's contract and the appeal by Grace.

2. Proceeding before Armed Services Board of Contract Appeals

On the 16th day of December, 1959, pursuant to contractual provision, Grace filed notice to appeal its dispute to the Armed Services Board of Contract Appeals ("Board"). The Board, by decision dated June 29, 1960, determined that Grace's appeal was not timely under the "Disputes" clause and granted the Government's motion to dismiss the appeal.

3. Court of Claims Action

Thereupon, on April 5, 1961, Grace instituted an action in the Court of Claims to recover damages totalling $456,000, arising out of the Government's breach of contract. Grace contended that although it was ready to perform its obligations, it was unable to do so by reason of the Government's refusal to issue the appropriate revised wage

determination reflecting pertinent increases applicable to the contract and that the Government had further unilaterally altered the scope of the work provision in direct contravention of its contractual obligations.

About two and one-half years after commencement of action, on October 18, 1963, the Government moved for summary judgment on the grounds that (1) Grace had failed to exhaust its administrative remedy, and (2) that Grace had failed to state a claim for which relief may be granted.

This motion was referred to Trial Commissioner Arens, who recommended to the Court of Claims that defendant's motion for summary judgment be denied (R. 48-65). The Court was unanimous in holding that Grace had exhausted its administrative remedies and that Grace's appeal to the Board had been timely. The majority of the Court, two judges dissenting, held that the Court of Claims under well settled case law, could and would retain the case for trial. A majority of the Court, therefore, by opinion dated May 14, 1965, adopted the Commissioner's recommendation (R. 66-87) and remanded the case to the Trial Commissioner for further proceedings in accordance with the Court's opinion.

4. Proceedings in the Supreme Court

On August 9, 1965, the Government filed its Petition for a Writ of Certiorari, which was granted on November 8, 1965 (R. 92). Argument thereon has been scheduled for March 23, 1966.

Summary of Argument

1. When the Contracting Officer fails to render such decision as is required under the "Disputes" clause, and thereafter the contractor files an appeal to the administrative Board and such Board denies such appeal on the ground that same is untimely, the failure of the Government

to furnish a "final decision" and refusal to afford contractor an opportunity to offer evidence on the merits, constitutes such delimitation of contractor's administrative remedy as to constitute an exhaustion of such remedy. Such facts bring the Grace case beyond the scope of either the "Dispute" clause or the Wunderlich Act as interpreted in *United States* v. *Carlo Bianchi & Co.*, 373 U. S. 709.

2. Neither the "Disputes" clause nor the Wunderlich Act, as interpreted under Bianchi, requires more than one administrative appeal and the Court of Claims receiving a case after completion of such first appeal, may retain for all purposes the matter before it under the broad exercise of its original and general jurisdiction.

3. The interpretation of the contract provisions and letters constituting Grace's appeal constitutes a question of law properly before the Court of Claims as a result of which that Court may retain general jurisdiction and resolve *de novo* all related factual issues.

ARGUMENT

I. Since the present suit is outside the scope of both the "disputes" clause in the contract and the Wunderlich Act, the holding in Bianchi is inapplicable.

The Court of Claims, from its inception, assumed jurisdiction over suits against the United States "founded" upon an "express or implied contract with the United States" (28 U. S. C. Sec. 1491 (Supp. 1951).) That Court and its functions relative to matters governed by the "Disputes" clause, was, in 1951 expressly restricted in *United States* v. *Wunderlich*, 342 U. S. 98, 100, 72 S. Ct. 154, 155, 96 L. Ed. 113, to determining whether or not the departmental decision had been founded on fraud, *i.e.*, "conscious wrongdoing and intention to cheat or be dishonest" (*United States* v. *Carlo Bianchi & Co.*, 83 S. Ct. 1409 (1963).)

In 1954, the Congress enacted what has since been known as the Wunderlich Act, 41 U. S. C. Section 321, which statute Justice Harlan in Bianchi, at page 714, stated:

> "... is entitled an Act 'To permit review of *decisions* of the heads of departments ... involving questions arising under Government contracts,' and provides in substance that a departmental *decision on a question of fact* rendered pursuant to a 'disputes' clause shall be final and conclusive in accordance with the provisions of the contract 'unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith or is not supported by substantial evidence.'" (emphasis provided)

Thereafter, on June 3, 1963, the Supreme Court rendered its decision in *United States* v. *Carlo Bianchi & Co.* (373 U. S. 709), holding that, "... in its consideration of matters *within the scope of the 'disputes'* clause in the present case, the Court of Claims is confined to review of the administrative record under the standards in the Wunderlich Act and may not receive new evidence." (p. 718) (emphasis provided).

In the *Grace* case, before the Court of Claims, the majority of that Court, Judges Davis and Laramore dissenting (R. 88), held that its retention of the case for trial for all purposes was not in conflict with Bianchi (R. 70-71). Paragraph 2 of the "Disputes" clause contained in the letter of acceptability, is the agreed contractual document concerning appeal procedure (R. 85-86). That provision specifically stated that in the event the Government alleged the contractor was unwilling or unable to perform, the Contracting Officer would be required to render a "decision" and the last sentence in the provision states that, "In connection with any appeal under this paragraph, you will be afforded an opportunity to be heard and to offer evidence in support of your appeal." (R. 86) The Court

of Claims unanimously determined that the "elements of a decision required by the 'Disputes' clause are not present" in the Government's letter of October 1, 1959 (R. 87) and that Grace's letter dated December 16, 1959 constituted a proper notice of appeal (R. 87). The Board, under the erroneous impression that the time was to be computed from an earlier letter of the Government (which latter letter was inadequate as a decision) had held that Grace's notice was untimely and denied Grace the benefit of the concluding paragraph of the "Disputes" clause above quoted, namely, the opportunity to be heard and offer evidence.

The Government, in its brief, relies upon *Bianchi* and makes this its sole point, namely, that under the circumstances and within *Bianchi*, the Court should remand the *Grace* case to the Board for partial relief, conceding that of necessity, certain issues must be reserved for the Court of Claims (Government's brief, pp. 17-18).

It is respectfully submitted that both *Bianchi* and the Wunderlich Act are completely irrelevant to the case before this Court and that the current controversy is totally outside the scope of the "Disputes" clause set forth in the letter of acceptability.

In *Bianchi*, a timely appeal was made to the Board, based upon a valid administrative decision, whereas in the *Grace* case, no valid "decision" was ever issued. In *Bianchi*, there was a full adversary hearing, each side offering evidence with opportunity for cross-examination, whereas in *Grace*, the issues before the Board were delimited solely to the issue of the timely filing of the appeal. In *Bianchi*, the contractor waited for six years before appealing the decision of the administrative agency to the Court of Claims, thereby differing materially from Grace's prompt appeal to the Court. In *Bianchi*, it was alleged that the administrative decisions were arbitrary

and not supported by evidence, whereas in the *Grace* case, no opportunity was afforded Grace to produce such evidence. In *Bianchi,* the Court of Claims received *de novo* evidence, whereas in *Grace,* the litigation has not progressed beyond the pleading stage.

The most glaring difference is to be found in the fact that the provisions in the *Bianchi* "Disputes" clause substantially differ from the provisions in the "Disputes" provision in the *Grace* case. In the *Grace* "Disputes" clause (R. 79-80), the following sentence appears: "In connection with any appeal under this paragraph, you will be afforded an opportunity to be heard and to offer evidence in support of your appeal." This provision does not appear in the *Bianchi* "Disputes" clause (83 S. Ct. 1409, 1411). It is our position that when first the Contracting Officer erred in failing to furnish a valid "decision" and then the Board erred in denying Grace the opportunity to be heard and offer evidence, pursuant to its appeal notice, the Government waived its rights to complain in the future and should be estopped from denying the right of Grace to be heard *de novo* in the Court of Claims, for to hold otherwise would permit the wrongdoer achieving a gain at the expense of the aggrieved.

In *Bianchi,* the Court, at page 714, specifically points out that it made no ruling on a situation where the controversy is outside the scope of the "Disputes" clause. The entire decision in *Bianchi* is grounded within a set of facts so radically different from *Grace* that to attempt now to ensnare the current dispute within the stricture of *Bianchi* would strain that case beyond its established holdings.

Under our Federal Constitution, the Supreme Court is the final arbiter of justice under law. Within the framework of that awesome responsibility, it speaks in a variety

of areas. Its pronouncements deeply affect not only sociological, but equally important, industrial action.[2]

Its decision in the case at Bar will, directly and indirectly, affect thousands of defense contractors. This segment of American industry carries many burdens in connection with its satisfying the voracious needs of the Government for goods and services. These contractors should not have imposed upon them additional legal burdens. There is the danger of overjudicializing Government Procurement Agencies. Dilution of judicial power should not be encouraged. "Under our system, restraint on governmental power, fair procedures and judicial review insure the supremacy of law over administrative absolutism" (Leventhal, Public Contracts and Administrative Law, *supra*, p. 40).

The Supreme Court addresses itself not only to matters of law but is equally concerned with policy and principle. The Supreme Court seeks to be practical and realistic. View then the posture of Grace, defense contractor who, over seven years ago, first offered its services to the Government, was subsequently denied an opportunity to appeal and in fact was told he was without administrative remedy. This was the ultimate impact of the Board's decision. Said contractor thereupon invokes the original jurisdiction of the Court of Claims. Said Court then determines that the Board erred in refusing such contractor's appeal and will

---

[2] As Judge Leventhal has observed:

"World War II, the Bomb, the cold war, Sputnik, the revolutions in science and technology—these cataclysms have transformed the nation's life and economy. The procurement contract has been hand-maiden to much of this transformation. Hundreds of billions of dollars have been spent in furtherance of national programs, and federal procurement expenditures are continuing, apparently indefinitely, at the level of $60-70 billion annually. Today the procurement process affects the quality of American life on a vast scale." (Leventhal, Public Contracts and Administrative Law, 52 ABA Journal 35, January 1966)

retain jurisdiction to resolve all matters on the merits. The Supreme Court at this late date is now asked to postpone Grace's day in Court to accommodate a possible partial administrative remedy.

Despite diligent search, no legal authority has been found compelling a Board to accept the *Grace* case. The Government, in its brief, gratuitously indulges in the assumption that, "the administrative board, having been told by the Court of Claims that it should consider and decide the factual disputes, will promptly do so." (p. 10), but fails to cite any authority to enforce such sanction.

Assuming, however, for purposes of argument, that the Board accepts such appeal, it may experience much discomfiture in refuting its original decision since in said decision it had found Grace's appeal to be untimely "beyond a peradventure of a doubt" (R. 38). Nevertheless, if the Board accepts jurisdiction and now finds Grace's appeal to have been timely, its inquiry and hearing, of necessity, is limited to certain issues only.

The Armed Services Board of Contract Appeals has consistently held that it does not have jurisdiction to review the decisions of the Federal Housing Commissioner on contracts such as that in issue here (*Len Co. and Associates,* 1962 BCA 17854 (ASBCA 1962); see also *Centex Constr. Co.* v. *United States,* No. 342-60, Ct. Cl., June 7, 1963).

In the *Grace* case, the Federal Housing Commissioner made a determination as to the applicable wage rates for certain labor on the job (R. 81). It was this determination by the Commissioner which became the subject of the dispute between the parties and culminated in the termination of Grace's contract. Since the only tribunal that can determine the correctness of the Federal Housing Commissioner's determination is the Court of Claims, it will be necessary that the issue of the propriety of the Commissioner's determination be fully litigated in the Court of Claims. The

issues therein involved cannot be segregated from the question of whether the Government wrongfully terminated Grace's contract, with resultant damages. The evils of fragmenting Grace's remedies offend every rule and policy dictating expeditious resolutions.[3] To compel two separate trials of issues which are joint and interrelated, would expose the contractor to considerable expense and delay.

In all probability, an additional two years will have expired so that in its ninth or tenth year Grace may again return to the Court of Claims for resolution of its remaining issues and damages. During this further period, it has lost the use of its bid deposit money and has experienced the economic hardship inherent in protracted litigation.

We urge this Court to accept the alternative which, under the facts in our case and within this perspective, justifies a holding which will permit the Court of Claims to retain jurisdiction on the merits for all purposes. Such solution would be realistic, practical and is supported by case law.

We urge this Court to adopt the policy it previously enunciated in *Bianchi* at page 717, where it acknowledged that "... the consequence of such a procedure (duplication of trials) would, in many instances, be a needless duplication of evidentiary hearings and a heavy additional burden in the time and expense required to bring litigation to an end." (Matter in parenthesis added.)

Further, in *Bianchi*, at page 718, the Court, explicitly acknowledged that the "Disputes" clause and Wunderlich Act only limited the appellate jurisdiction of the Court under the "Disputes" clause and did not constitute limitations upon the original jurisdiction of the Court of Claims,

---

[3] See Eldon H. Crowell and David V. Anthony "Practical Problems Facing Contractors' Counsel as a Result of Fragmentation of Remedies"—18 THE ADMINISTRATIVE LAW REVIEW 128 (Fall, 1965).

and stated, "And in any case in which the department failed to remedy the particular substantive or procedural defect or inadequacy, the sanction of judgment for the contractor would always be available to the Court."

It is respectfully submitted that neither the Wunderlich Act nor *Bianchi* impose upon Grace the hardship of multiple timely administrative appeals as a condition precedent to relief in the Courts.

II. Where the contracting officer fails to perform an act required under the contract and where the administrative agency refuses to accept jurisdiction, the aggrieved party is deemed to have exhausted its administrative remedy and is thereby justified in filing suit in the Court of Claims.

The Armed Services Board of Contract Appeals (Board), after protracted hearing, granted the Government's motion and dismissed Grace's appeal, holding that Grace had failed to file its appeal within the thirty days prescribed in the "Disputes" clause (R. 25-39). The Panel member, in writing for the Board, noted that, "The parties are in complete agreement that it was and is their mutual interpretation that in the event a timely appeal is taken thereunder the 'disputes paragraph' of the Letter of Acceptability confers jurisdiction on the Board to review a decision relating to cancellation of commitments, withholding of bid security, and itemization and determination of actual damages" (R. 36). Thus, Grace had in fact demonstrated its desire to have the Board undertake a complete administrative review, only to be later told that its appeal was not timely. The Panel member, for emphasis and support of the correctness of his decision, stated that the cutoff date for appeal purposes established by him was the correct one "beyond peradventure of a doubt" (R. 38) in which conclusion the Chairman of the Panel

concurred, with the third member of the Panel not participating (R. 38).

It should be noted that the decision of the Board is certified as "findings of fact, decision and views of the Air Force Contract Appeals Panel . . ." (R. 39).

It is conceded that untimeliness of appeal, where sustained, may preclude relief. Such was the case in *Automatic Screw Prods. Company* v. *United States,* 169 F. Supp. 95, 145 Ct. Cl. 94. There the contractor delayed some eight months in filing its appeal notice with the Contracting Officer and the Court of Claims found that, "There is nothing in the record to justify plaintiff's claim that negotiations between the parties extended its time to appeal" (145 Ct. Cl. at 98).

In Grace, a different conclusion was reached. The Commissioner, in considering the letters constituting notice and decision (R. 40-46) recommended to the Court that Grace's appeal was filed in timely fashion and that Grace "did exhaust its administrative remedies, and is entitled to seek relief in this court" (R. 63). The full Court, with slight modification, adopted said holding (R. 67). The Court was unanimous in its conclusion that the Board had improperly refused to consider Grace's appeal on the merits (R. 69) and that Grace had made a timely appeal and had exhausted its administrative remedy (R. 87). Under its system the Court of Claims now combines in one forum the facilities and attributes of trial and appellate functions, the Commissioners serving as trial judge and the full court providing appellate functions.[4]

Where the Contracting Officer refuses to render a decision or delays his decision excessively, the contractor may seek relief in the Court (*Maxan Dress Corp.* v. *United States,* 115 F. Supp. 439 (1953); *U. S. Casualty Co.* v. *United States,* 67 F. Supp. 950 (1946).

---

[4] W. Ney Evans, THE UNITED STATES COURT OF CLAIMS—17 THE FEDERAL BAR JOURNAL (No. 2) 85, at page 99.

Subsequent to the Bianchi case, the Court of Claims permitted remedies to correct failures of contracting officers to complete their assigned duties without further administrative proceedings (*C. J. Langenfelder & Sons, Inc.* v. *United States*, 334 F. 2d 600; *H. B. Zachry Co.* v. *United States*, No. 332-61, Ct. Cl., April 16, 1965). A similar rule should pertain where an administrative agency fails to assume its responsibility by taking the appropriate action.

Similarly, where the agency head has erred, the Court has likewise accepted the petition of the contractor (*Southeastern Oil Florida, Inc.* v. *United States*, 115 F. Supp. 198 (1953); *Heid Bros., Inc.* v. *United States*, 69 Ct. Cl. 704 (1930); *Cape Ann Granite Co., Inc.* v. *United States*, 100 Ct. Cl. 53, cert. denied, 321 U. S. 790; Cf. *Hele* v. *United States*, 100 Ct. Cl. 289 (1943) and 103 Ct. Cl. 472 (1945).

The principles enunciated above apply equally to the inaction of a contracting officer as well as where the Board has refused jurisdiction, whether in error or otherwise, and empower the Court in the instant case to retain full jurisdiction.

As a general rule, the contractor must first exhaust its administrative remedies provided in the contract before it may sue in the Court (*United States* v. *Blair*, 321 U. S. 730, 735; *United States* v. *Holpuch Co.*, 328 U. S. 234, 240). However, where the administrative appeal procedure is defective or inadequate, the Supreme Court has stated this to constitute an exception to the rule.

In Blair, the Supreme Court stated that (pp. 736-737), "If it were shown that the appeal procedure provided in the contract was in fact inadequate for the correction of the alleged unreasonable attitude of the subordinate Government officials, we would have quite a different case."

Mr. Justice Frankfurter, dissenting in part from the majority holding in Blair, stated that (p. 739), "Accordingly, provisions in a Government contract defining meth-

ods for settling controversies by appeal to the contracting branch of the Government presuppose effective resort to such methods of settling questions that arise in carrying out a contract—they presuppose that administrative remedies as a condition to judicial relief are not rendered futile and nugatory."

Likewise, in Holpuch, the Supreme Court stated, at page 240, "And in the absence of some clear evidence that the appeal procedure is inadequate or unavailable, that procedure must be pursued and exhausted before a contractor can be heard to complain in a court."[5]

Clearly, in Grace, no other administrative remedy was available. The unanimous decision of the Court of Claims established that Grace's appeal was timely and that in fact Grace did exhaust its administrative remedy.

There is no provision either in the stated "Disputes" clause or in law or regulation requiring repeated recourse to an administrative agency as a condition to bringing suit in the Court of Claims and no contractor should be required to pursue such multiple actions to the point of exhaustion.[6]

For these reasons, the Court of Claims should be permitted to retain jurisdiction.

---

[5] See Schultz, Wunderlich Revisited: New Limits on Judicial Review of Administrative Determination of Government Contract Disputes, 29 Law & Contemp. Prob. 115, 127 (1964); Spector, Is It "Bianchi's Ghost"—Or "Much Ado About Nothing"?, 16 Ad. L. Rev. 265, 289 (1964).

[6] See Davis, Administrative Law, Fol. 199 Sec. 189 (1951) and generally, *Brister & Koester Lumber Corp.* v. *United States*, 188 F. 2d 986 (D. C. Cir. 1951); *United States* v. *Blake*, 161 F. Supp. 76 (E. D. N. C. 1958); *Wessel, Duval & Co.* v. *United States*, 126 F. Supp. 79 (S. D. N. Y. 1954).

III. The administrative record before the Court of Claims involves a question of law, thereby permitting said court to retain general jurisdiction and to resolve de novo all the related factual issues.

Approximately two and one half years after the action was commenced in the Court of Claims, the Government moved for summary judgment on the grounds that (1) Grace had failed to exhaust its administrative remedies, and that (2) it failed to state a cause of action. After finding Grace had exhausted its administrative remedies, the Court summarized the facts pertinent to the latter point, as follows:

> "*The second issue is whether, in any event, plaintiff states a cause of action.* Defendant contends that, irrespective of the issue of exhaustion of administrative remedies, plaintiff may not maintain its action because under the terms of the letter of acceptability plaintiff could not refuse to 'close' a Capehart contract over a disagreement on the administrative determinations of appropriate minimum wages for the housing project, and that such determinations are not subject to judicial review.
>
> Plaintiff has pleaded in its petition that defendant 'unilaterally altered the scope of work provisions' and issued 'wage schedules in direct contravention of its contractual obligations,' and that defendant's action made it impossible for plaintiff to continue in its efforts to perform under the contract. Plaintiff further contends that its interpretation of the plans and specifications is correct 'in light of the interpretation given such plans and specifications by custom and usage in the trade.'
>
> Thus, the parties are in disagreement over the nature of the issue presented and, of course, the Armed Services Board of Contract Appeals, having reached its decision solely on the matter of the timeliness of plaintiff's appeal, did not consider any other issue.

[fol. 198] The Trial Commissioner recommended that the decision on defendant's contention that plaintiff fails to state a cause of action should be resolved only after trial. In the Trial Commissioner's view, the issues are not now precisely framed; evidence as to the conduct of the parties may shed some light on the issues, and there are unresolved issues of fact." (R. 67-68)

The Court then concluded that (R. 85) ". . . interpretation of the provisions of the contract documents which set forth the specifics of an appeal and the corresponding interpretation of the effect of letters which allegedly constituted 'decisions' and/or 'appeals,' *is a question of law; hence, it and related factual issues are to be resolved independently by the court even though the sole record before the court is the administrative record.* P.L.S. Coat & Suit Corp. v. United States, 148 Ct. Cl. 296 (1960); Beacon Construction Co. v. United States, 314 F. 2d 501 (Ct. Cl. 1963); WPC Enterprises, Incorporated v. United States, 323 F. 2d 874 (Ct. Cl. 1963); Stein Bros. Mfg. Co. v. United States, 337 F. 2d 861 (Ct. Cl. 1963); Wingate Construction Co. v. United States, No. 394-60 Ct. Cl., January 24, 1964."

The ultimate issue in the *Grace* case relate to the interpretation of the contractual documents, including the various minimum wage schedules and specifically, the rulings of the Departments of Air Force, and Labor and Federal Housing Authority, all of which constitute a matter of law. This is now well established (*Stein Bros. Manufacturing Co.* v. *United States,* 337 F. 2d 861 (Ct. Cl. 1963). Further, in the *Stein* case (*supra*), at 162 Ct. Cl. 802, 805-806, determined after *Bianchi,* it was held that where the ultimate issue is one of law, neither *Bianchi* nor the Wunderlich Act precluded the Court from considering "any evidence bearing on that legal issue, no matter what the Board of Contract Appeals determined or what was in the record before it."

We point out that the facts in the *Stein* case are not similar to that of *Grace,* for in *Stein* there was a full hearing before the Board and additional testimony taken before the Court of Claims. Nevertheless, the Court does speak with authority in connection with its powers and jurisdiction. It is the Court's conclusion that nothing in *Bianchi* or the Wunderlich Act delimited the inherent general jurisdiction of the Court of Claims. It restates the proposition that *Bianchi* as well as the Wunderlich Act concerned themselves with procedural or evidential matters. The Court concludes at page 809, that, ". . . the Wunderlich Act—unlike the normal statute vesting power in an administrative agency—does not grant the administrative bodies exclusive jurisdiction over the entire subject of the contract; the Act merely makes the administrative findings conclusive (in the absence of arbitrary action, etc.) on those particular matters of fact dealt with by the administrators, without depriving this court of its general jurisdiction over the contract under the Tucker Act. . . ."

The Supreme Court has affirmed this principle that direct approach can be made to the courts on questions of law. *Bell Aircraft Corp.* v. *United States,* 100 F. Supp. 661 (1951), aff'd, 344 U. S. 860 (1952). In *Bell,* the Contracting Officer rendered a decision that certain items of cost were not reimbursible under the contract. The contractor was not required to appeal that decision but could proceed directly to the courts.[7]

We respectfully submit that for the foregoing reasons, this Court permit the Court of Claims to retain this action for all purposes.

---

[7] Discussion of distinction between questions of law and questions of fact, see Davis, ADMINISTRATIVE LAW, 874 (1957); see Owen Birnbaum, QUESTIONS OF LAW AND FACT AND THE JURISDICTION OF THE ARMED SERVICES BOARD OF CONTRACT APPEALS—19 FEDERAL BAR JOURNAL (#2) 120 at p. 132.

Conclusion

1. It should be emphasized that the initial error was made over six years ago when the Contracting Officer failed to issue an appropriate "decision" as required by him under the "Disputes" clause. This omission was compounded when the Board erroneously declared the appeal of Grace to have been untimely. Grace furthermore was denied an opportunity to offer evidence pursuant to the "Disputes" clause. The cumulative impact of the foregoing was to deny administrative remedy despite every cooperation and willingness on the part of Grace. It having been determined that Grace exhausted its administrative remedy, we have here a situation which is beyond the scope of either the "Disputes" clause or the Wunderlich Act as interpreted in *Bianchi*.

2. Furthermore, the general and original jurisdiction of the Court of Claims should not be eclipsed. This contractor is entitled to speedy relief, particularly in view of the fact that the matter has been before the Court of Claims for almost five years.

3. Finally, the ultimate issue involving the interpretation of the contract is a question of law which properly is presently before the Court of Claims and should not be disturbed. It is of critical importance to reemphasize that certain aspects of this case, for example, the review of decisions of the Federal Housing Commissioner on contracts such as in issue here, are beyond the jurisdiction of the Board and will, of necessity, require resolution before the Court of Claims. Consequently, fragmenting the remedy of the contractor by remanding this case to the Board for any purpose, will not be consistent with the Supreme Court's policy to expedite litigation.

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed and the cause retained in the Court of Claims and the case remanded to the Trial Commissioner for further proceedings in accordance with the decision of the Court of Claims.

Dated: Garden City, New York,
March 9, 1966.

Respectfully submitted,

DAVID FROMSON,
Attorney for Respondent.

DAVID FROMSON,
RICHARD L. BRENNER,
on the Brief.